No. 16-1498

IN THE
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
Petitioner,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the Yakama Treaty of 1855 preempts Washington's fuel taxes, Wash. Rev. Code §§ 82.36, 82.38 (2013), as applied to Respondent's transportation of fuel between the Washington state line and the Yakama Indian Reservation?

CORPORATE DISCLOSURE STATEMENT

Respondent is Cougar Den, Inc. There is no parent company or publicly held company owning 10% or more of its stock.

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INTRODUCTION

In 1855, the Yakama Nation entered into a treaty with the United States in which the Yakamas relinquished the vast majority of their land. In exchange, the Yakamas "secured," among other things, "the right, in common with citizens of the United States, to travel upon all public highways." That "right to travel" encompasses the right to transport goods for purposes of trade: According to an unchallenged factual finding, the United States negotiators' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." J.A. 70a.

This Court has never construed the Treaty's right-to-travel provision. But it has construed the Treaty's next sentence, which "further secured ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." This Court has held that this similarly worded provision bars the State from "charg[ing]" the Yakama "for exercising the very right their ancestors intended to reserve," and so prohibited the State from imposing a nondiscriminatory fishing-license fee on Yakama fishermen. *Tulee v. Washington*, 315 U.S. 681, 685 (1942). It follows from *Tulee* that the Yakamas are exempt from taxes arising from exercising their rights under the right-to-travel provision—a conclusion reached by a federal district court opinion that the State is collaterally estopped from challenging.

Respondent Cougar Den, Inc., a Yakama corporation, buys fuel in Oregon, transports it to the Yakama Reservation in Washington, and sells it to Yakama-owned fuel stations. A 27-mile gap exists between the Washington/Oregon state line and the reservation entrance. Respondent transports fuel on a highway spanning that gap.

It is undisputed that if that gap did not exist—if the reservation reached the Washington state line—the State could not tax Respondent. In that scenario, Respondent's travel within Washington would take place entirely on the Yakama Reservation. And, under this Court's cases, the State would be forbidden from taxing Respondent's on-reservation economic activity.

But the State contends that Respondent's travel between the state line and the Yakama Reservation opens the door to imposing its fuel tax. The tax, by its terms, applies to Respondent because Respondent "import[s]" fuel. According to the State, the tax may be imposed because the importation takes place at the state line—before Respondent has reached the reservation entrance.

For every other Tribe in Washington, a tax triggered by off-reservation importation would not be preempted: No other Tribe secured any relevant off-reservation rights that would protect them from the tax. But the Yakamas, alone among Washington's Tribes, negotiated not only a reservation, but also a right to travel on off-reservation highways. And here, the *only* thing Respondent is doing off the reservation is traveling on the highway to bring goods to market on the reservation—which is treaty-protected activity.

The Treaty thus prohibits the State from taxing that activity.

The State's core theory is that its tax is "on" possession of fuel, rather than "on" transportation. But even if the tax were "on" possession, it would be preempted. If Respondent has a right to transport fuel tax-free, it necessarily has a right to possess fuel in connection with that transportation tax-free, because it is impossible to transport fuel without possessing it. The State emphasizes that the tax is imposed on other entities, such as refineries, who possess fuel without transporting it. But this is irrelevant. Preemption under the Treaty turns on whether the *tribal members* are engaging in protected activity, not on whether the tax applies to other entities not engaging in that activity.

Even if preemption turned on whether the tax was "on" possession or "on" transportation, Respondent must still prevail. By its express terms, the statute levies a tax on the "import[ation]" of fuel, not "possession." Thus, the Washington Supreme Court held that the state tax was "on" importation, and hence "on" transportation. That interpretation of State law binds this Court. And under this Court's cases—including a case dealing with a fuel tax substantively indistinguishable from the tax here—that point is dispositive in establishing preemption.

The State contends that Respondent's proposed rule will preclude the State from taxing the Yakamas' goods at *any* point if those goods *were* or *will be* transported on the highway at some other time. The State is wrong. The State can tax any event (such as a

sale or purchase of goods) distinct from the exercise of treaty-protected rights. The Treaty is implicated only if the sole taxable event is the Yakamas' transportation of themselves or goods. Thus, the State is free to restructure its tax so that it is not triggered by the exercise of treaty-protected activity. In its current form, however, the tax is preempted.

STATEMENT OF THE CASE

A. The Yakama Treaty

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian Tribe. Pet. App. 62a. The modern Yakama Nation was formed in 1855 when the United States executed a treaty with the 14 tribes and bands that would, from that day forward, compose the Nation. J.A. 60a. As the Nation's founding charter, the Treaty is a sacred document to the Nation's members, "embod[ying] spiritual as well as legal meaning for the tribe." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997) ("*Yakama Indian Nation*"), *aff'd sub nom.*, *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

In the Treaty, the Yakama Nation surrendered 10 million acres—over 90% of its territory—to the United States. Treaty with the Yakamas, art. I, 12, June 6, 1855, Stat. 951. In exchange, the Treaty "secured to the Yakamas" certain "basic rights ... that encompass their entire way of life." *Yakama Indian Nation*, 955 F. Supp. at 1238. Three of those rights are relevant here.

First, Article II created a reservation "for the exclusive use and benefit" of the Yakama Nation, within what is now Washington state.

Second, Article III, Paragraph 1 secured the right to travel:

> And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.

Third, Article III, Paragraph 2 secured the right to fish:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory ....

The right to travel was critical to the Yakama Nation. Before the Treaty, travel was "an intrinsic ingredient of virtually every aspect of Yakama culture," and "was particularly important for the purpose of trade." *Yakama Indian Nation*, 955 F. Supp. at 1238. "A network involving the exchange and interchangeability of goods and services existed

between Indian tribes of the Northwest and surrounding areas, and the Yakamas were a central part of the network ...." *Id.* This occurred in part because "[t]he Yakamas' way of life depended on goods that were not available in the immediate areas"—thus obtainable only via trade. *Id.*

To protect that crucial trade, the Yakamas, alone among Washington's Tribes, negotiated a specific Treaty provision regarding off-reservation travel.[1] At the treaty negotiations, "the Yakamas' right to travel ... was repeatedly broached." *Id.* at 1243. Isaac Stevens, the Governor of Washington Territory, persuaded the Yakamas to accept the proposed reservation in part because of its proximity to public highways: "You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market." *Id.* at 1244 (quoting Official Treaty Proceedings at 64). He explained, "You will be allowed to go on the roads to take your things to market ... All that outside the reservation." *Id.* (emphasis omitted) (quoting Official Treaty Proceedings at 67). He assured the Yakamas that this was the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Id.* (quoting Official Treaty Proceedings at 69).

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[1] Only two other Indian treaties, involving tribes in other States, contain similar provisions. U.S. Br. 2 n.1.

B. Washington's Fuel Tax

Washington imposes a tax on wholesale suppliers of fuel. Who must pay the tax depends on how the fuel is transported into the State.

If the fuel is brought into the State "by pipeline or vessel," it is defined as fuel imported via "bulk transfer." Wash. Rev. Code § 82.36.010(3), (4) (2012).[2] That fuel is taxed, *not* when it is imported into the State, but instead when it is either first sold, *id.* § 82.36.020(2)(f), or first "removed" from a "terminal" or "refinery" and loaded onto a "truck, trailer, railcar," or other means of ground transportation, *id.* §§ 82.36.020(2)(a), (b), 82.36.010(22). Thus, this fuel is generally not taxed when it is first possessed in the State, but rather only when some subsequent sale or transfer occurs.

But fuel that is brought into the state via trucks or railcars is treated differently. Fuel that is imported "not by bulk transfer" is taxed when it "enters into," *i.e.*, is imported into, the State. *Id.* § 82.36.020(2)(c)(2).[3] Accordingly, a "[m]otor vehicle fuel importer" is

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[2] Respondent was taxed for importing both "motor vehicle fuel" and "special fuel." *See* Wash. Rev. Code chs. 82.36 (motor-vehicle fuel), 82.38 (special fuel). However, the relevant provisions of the two chapters are identical. Respondent therefore cites only the motor-vehicle fuel tax provisions.

Except where otherwise noted, citations to the Washington Revised Code are to the 2012 version, in effect when the relevant events occurred.

[3] If a pipeline or barge owner is *unlicensed*, it would also pay the tax at importation. *See id.* § 82.36.020(2)(c)(1).

defined as "a person who imports motor vehicle fuel into the state *by a means other than the bulk-transfer terminal system*," *i.e.*, "a railcar, trailer, truck, or other equipment suitable for ground transportation." *Id.* §§ 82.36.010(16) (emphasis added), 82.36.010(4). Thus, fuel that is imported into the state via truck or railcar—and *only* that fuel—is taxed as it is transported into the State.

Finally, not all wholesaler suppliers of fuel are taxed. Exported fuel, or imported fuel intended for a destination outside Washington, is not taxed. *Id.* § 82.36.230.

C. Respondent Cougar Den

Respondent Cougar Den, Inc. is a private business organized under the laws of the Yakama Nation and owned by Kip Ramsey, an enrolled member of the Yakama Nation. Pet. App. 63a.

In 1993, the Yakama Nation appointed Cougar Den as the Yakama Nation's sole agent "for the purpose of obtaining petroleum products for sale and delivery to its members." J.A. 99a-100a. Cougar Den verifies that it sells to tribal businesses. Clerk's Papers 471, 474-79. Cougar Den collects and remits tribal taxes to the Yakama Nation. J.A. 99a.

Cougar Den began hauling fuel from Oregon to the Yakama Reservation in 2013. Pet. App. 63a-64a, J.A. 27a-28a. Between Oregon and the Reservation is a 27-mile strip of Washington state land that Cougar Den's trucks must cross. Pet. App. 64a. Cougar Den's trucks travel across that strip of land exclusively on public highways. *Id.* As shown below, that strip of land is

part of the Ceded Area of the Yakama Nation—*i.e.*, the land that the Yakamas ceded to the United States in the Treaty. *Id.*

D. Course of Proceedings

In December 2013, the Washington State Department of Licensing assessed Respondent and Kip Ramsey $3,630,954.61 in unpaid fuel taxes and penalties for importing fuel from Oregon into Washington without paying the State's fuel tax or possessing a state import license. Pet. App. 65a.

Respondent appealed the assessment to a state administrative law judge. The ALJ held that the Assessment was an impermissible restriction on travel under the Treaty. *See* Resp. App. 13-14.

The Department sought internal review of this order, which was reversed by the Department's

Director. Pet. App. 44a-61a. Respondent in turn appealed to the state Superior Court. The Superior Court reversed the Director, finding that the Assessment violated the Treaty and that the Director violated Washington's Appearance of Fairness doctrine by not recusing herself given that she had previously acted for the State against the Yakamas in a related fuel-tax dispute. *Id.* at 30a-35a.

The Washington Supreme Court affirmed on the first ground by a 7-2 vote. *Id.* at 1a-16a. Interpreting Ninth Circuit precedent on the right-to-travel provision, the Court distinguished between taxes or restrictions on "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market," *id.* at 12a (quotation marks omitted) (quoting *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014)), which are preempted, and taxes or restrictions on "trade [that] does not involve travel on public highways," *id.* at 13a, which are not.

The Court concluded that Washington's fuel tax was preempted under that standard. The State had argued that "the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways." *Id.* Two dissenting Justices agreed with that interpretation of the state statute, contending that "Washington's fuel excise tax burdens trade—the first instance of wholesale possession of fuel within Washington—not fuel transport." *Id.* at 17a.

The Court rejected that interpretation of the state statute, instead holding that the statute "taxes the importation of fuel, which is the transportation of fuel."

Id. at 16a. Thus, the Court reasoned, "[h]ere, travel on public highways is directly at issue because the tax [is] an importation tax." *Id.* at 13a. The Court accordingly held that the Treaty preempted the tax. *Id.* at 16a.

SUMMARY OF ARGUMENT

The Yakama Treaty's right-to-travel provision preempts the application of the State's fuel tax to Respondent.

I.A Two sources of authority establish the framework for resolving this case. The first is the line of this Court's cases construing the Treaty's right-to-fish provision, which appears in the same Article of the Treaty as the right-to-travel provision. The second is the decision containing the most extensive analysis of the right-to-travel provision: *Yakama Indian Nation*, 955 F. Supp. 1229. *Yakama Indian Nation* binds the State in this case. The Superior Court below explicitly incorporated *Yakama Indian Nation*'s factual findings into the record and held that the State was collaterally estopped from challenging those findings. The State never challenged those findings and waived any objection to the Superior Court's collateral estoppel determination.

I.B Those sources of authority establish four bedrock propositions regarding the right-to-travel provision. *First*, it protects the right to transport goods for purposes of trade. *Second*, it secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected travel. *Third*, it applies even to nondiscriminatory fees and

taxes. *Fourth*, it preempts taxes and fees, but does not preempt certain regulatory provisions.

II.A These principles support two alternative bases for finding preemption in this case. As Part II explains, the tax is preempted because the Treaty secures Respondent's pre-existing freedom from taxation. Respondent's transportation of goods on the highway is treaty-protected activity, and, at the time of the Treaty, the transportation of goods would not have been taxed. Indeed, the State of Washington did not exist. Further, all of Respondent's transportation of fuel occurs in the Ceded Area—that is, the land the Yakamas ceded to the United States in the Treaty. Before the Treaty, when this land was still the Yakamas' land, the Yakamas would have been *immune* from tax. The Treaty ensures that if the Yakamas engage in their treaty-protected right to travel, they continue to be free from tax. Thus, Respondent may transport fuel to the reservation without incurring a tax obligation.

II.B This analysis vindicates Respondent's right to travel by ensuring that the State cannot exploit that travel as a basis for imposing a tax that could not be imposed based on on-reservation activity. The Treaty secures *both* a reservation *and* the right to off-reservation travel. The natural reading of the Treaty is that just as the Yakamas may engage in economic activity on the reservation without being taxed, they may transport goods to and from the reservation without being taxed.

II.C That does not mean that *any* activity connected to highway travel cannot be taxed. Rather,

preemption should turn on whether a Yakama is *only* exercising its treaty-protected right to travel—in which case the tax is preempted. If not—if the Yakama is engaging in a distinct activity—that activity may be taxed. Here, the tax is preempted because Respondent is *only* exercising its right to transport goods on the highway.

II.D The State contends that the tax is "on" possession rather than "on" transportation. It emphasizes that refineries must pay the tax when they possess fuel, even if they do not transport it. But this is irrelevant. What matters for preemption is that *Respondent's* travel is burdened by the tax.

III.A Alternatively, this Court's right-to-fish cases and *Yakama Indian Nation* at least establish that a tax *triggered* by treaty-protected activity is preempted. Here, the state statute expressly provides that it is triggered by importation, and the state supreme court construed it as such. The claim that the statute is triggered by possession rather than importation is an improper challenge to the state supreme court's interpretation of state law.

III.B The State and the United States ask the Court to conduct a holistic analysis of what the tax is "on." They argue that the tax should holistically be viewed as effectively taxing the insertion of fuel into the stream of commerce. This analysis is irreconcilable with *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), which addressed a fuel tax statute virtually identical to the statute here. In *Wagnon*, this Court held that preemption should turn on the taxpayer's activity that formally triggers the tax, not a

holistic analysis of the effective target of the tax. Here, the activity that triggers the tax is Respondent's importation, so it is preempted under *Wagnon*.

III.C The State's core intuition is that—contrary to the state supreme court's interpretation of the statute—possession of fuel is the Legislature's *target* for the tax. But the target for the tax can be framed in multiple ways: the Legislature can plausibly be said to be targeting possession of fuel, *or* off-reservation transportation of fuel, *or* on-reservation sales of fuel, *or* merely the goal of maximizing funds for highway repair. Rather than engage in an indeterminate analysis of a tax's "target," the Court should hold that preemption turns on the trigger for the tax.

III.D The State's next argument—that the tax applies to transportation, but not transportation *on highways*—is even weaker. The only importation the statute actually taxes is importation on the highway. And even if the statute did tax importation via other means, that would be irrelevant. The burden on the right to travel on the highway would not be lessened by the fact that the statute also applies to travel by other means.

IV.A. The State maintains that a treaty cannot preempt a tax unless it contains a "clear statement" of preemption. This is simply wrong. The State's position is irreconcilable with this Court's right-to-fish cases and *Yakama Indian Nation*, has no principled basis, and is inconsistent with numerous longstanding tenets of Indian law. No case supports the State's purported clear-statement rule; all of the State's cited cases

applying a "clear statement" rule involve interpretations of federal statutes, not treaties. .

IV.B. The State's two key cases similarly do not support its position. The first, again, turned on interpretation of a federal *statute*. In the other, the treaty expressly disclaimed that it applied outside of reservation boundaries.

V. The State's practical concerns are unwarranted. Respondent's position will not jeopardize the State's fuel or cigarette tax regimes, given that the State may tax the importation of goods by any other Tribe, the off-reservation sale of goods by Respondent, or the on-reservation sale of goods to any non-Indian.

ARGUMENT

I. THIS COURT'S RIGHT-TO-FISH PRECEDENTS, AND *YAKAMA INDIAN NATION*, ESTABLISH THE FRAMEWORK FOR RESOLVING THIS CASE.

This brief will first address the key sources of authority relevant to the Yakama Treaty's right-to-travel provision, and the principles established by those authorities.

A. This Court's right-to-fish precedents, and *Yakama Indian Nation*, are the authorities most relevant to this case.

This Court has never construed the Yakama Treaty's right-to-travel provision. Two sources of authority, however, are relevant to the interpretation of that provision.

The first source of authority is this Court's line of cases construing the Treaty's right-to-fish provision. The right-to-travel provision, in Article III, Paragraph 1, "secure[s] ... the right, in common with the citizens of the United States, to travel upon all public highways." The right-to-fish provision, in Article III, Paragraph 2, "further secure[s] ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." These two provisions have two textual similarities: they both "secure" an off-reservation "right," and that right is "in common with" non-Indian citizens. Thus, this Court's cases construing those terms in the right-to-fish provision are directly relevant to the interpretation of the same terms in the right-to-travel provision.

The second source of authority is *Yakama Indian Nation*. The *Yakama Indian Nation* litigation concerned whether the Treaty preempted the application of Washington licensing and permitting fees to Yakama-owned logging trucks. In an initial order, the District Court held that the Treaty preempted the fees as a matter of law. *Cree v. Waterbury*, 873 F. Supp. 404, 433-34 (E.D. Wash. 1994). The Ninth Circuit, however, reversed, concluding that fact-finding was necessary. *Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996). Because the "scope of the highway right" depended on "the parties' intent when they signed the treaty," the court directed the District Court "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed." *Id.* at 1403, 1405.

On remand, the District Court conducted a bench trial. The court made extensive findings on the scope of the Yakama Treaty's right-to-travel provision and again concluded that the Yakama Treaty's right-to-travel provision preempted the fees. *Yakama Indian Nation*, 955 F. Supp. at 1260. The Ninth Circuit affirmed. *Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998). As explained below, the *Yakama Indian Nation* findings are exceptionally thorough and highly relevant to this case.

Nevertheless, the State's brief invites this Court to ignore *Yakama Indian Nation*, observing that the Court is "of course not bound" by the Ninth Circuit's decisions. Pet. Br. 28-29 & n.9; *see also* U.S. Br. 28-30. The State is, however, bound by *Yakama Indian Nation*'s findings, and they should be treated as established for purposes of this case.

First, the State has never previously challenged *Yakama Indian Nation* in this litigation, as both Respondent and the United States pointed out at the certiorari stage. BIO 33 (noting that the State has never "disputed the historical findings of the federal court in [*Yakama Indian Nation*], though the [State] itself was a party to that case"); U.S. Cert. Br. 19 ("[B]oth parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the 1855 Treaty ....").

Second, and more importantly, the Superior Court held below that the State is collaterally estopped from challenging *Yakama Indian Nation*'s findings—a determination the State never appealed.

In *Yakama Indian Nation*, both Kip Ramsey (who owns and operates Respondent) and the Yakama Nation were named plaintiffs; indeed, Mr. Ramsey personally testified. *See* 955 F. Supp. at 1261 (Finding 5); J.A. 57a-58a. The State was the losing defendant. Thus, at the agency level in this case, Respondent requested that *Yakama Indian Nation*'s findings be inserted into the agency record, and argued that the State should be collaterally estopped from challenging them. Clerk's Papers 257-58. The State did not object, and the agency (Petitioner in this Court) granted Respondent's request.

On appeal to the Superior Court, Respondent again argued that *Yakama Indian Nation* was "preclusive in this case and the Department did not object to that" below. July 10, 2015 Tr. 2. Again the State did not object, and the Superior Court issued an order stating: "[T]he Court incorporates by reference the Findings of Fact of [*Yakama Indian Nation*].... To examine the historical context of the Treaty, the Director should have looked to the Findings of Fact of [*Yakama Indian Nation*] .... Such Findings are preclusive in this case." Pet. App. 33a-34a.

The State did not challenge this preclusion ruling in the Washington Supreme Court, even though Respondent relied on it in its brief. *See* Cougar Den Br. 18 n.48 (Wash. Jan. 25, 2016) ("Cougar Den previously argued that the findings in [*Yakama Indian Nation*] are preclusive in this case.... The [State] did not challenge that argument."). Thus, the Washington Supreme Court stated that the "factual record regarding the treaty interpretation of the historical

meaning of the right to travel relied on below was developed in a federal action, [*Yakama Indian Nation*]." Pet. App. 6a. In its petition for certiorari, the State again did not challenge the collateral-estoppel ruling. Having never challenged *Yakama Indian Nation* below—and having actually been held to be precluded from doing so, and failing to appeal that determination—the State cannot do so now. As such, the Court should take that ruling—and *Yakama Indian Nation*'s factual findings—as established.

B. This Court's right-to-fish precedents, and *Yakama Indian Nation*, establish four critical principles.

This Court's right-to-fish precedents and *Yakama Indian Nation* establish four propositions about the Yakama Treaty's right-to-travel provision which guide the outcome of this case:

- It protects the right to the right to transport goods for purposes of trade.
- It secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected activity.
- It applies even to *nondiscriminatory* fees and taxes.
- It preempts fees and taxes, but does not preempt certain regulatory provisions.

The legal basis for each principle is explained in turn.

1. The right-to-travel provision protects the right to transport goods for purposes of trade.

The first established proposition is that the Treaty's right-to-travel provision secures the Tribe's right to transport not only themselves, but also goods on the highway for purposes of trade.

Yakama Indian Nation reached that conclusion based on an extensive analysis of the Treaty's historical backdrop. The Court explained that "[p]rior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other ... tribes," as well as with "non-Indians, particularly the Hudson's Bay Company." 955 F. Supp. at 1262-63 (Findings 23, 25); J.A. 61a-62a. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to ... trade." *Id.* at 1264 (Finding 43); J.A. 65a. When negotiating the Treaty, U.S. delegates specifically promised that the right to travel *with goods for trade* would be secured. Governor Stevens stated: "You will be allowed to go on the roads to take your things to market ... All that outside the reservation." *Id.* at 1244 (quoting Official Treaty Proceedings at 67) (emphasis omitted). Stevens called this the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Id.* (quoting Official Treaty Proceedings at 69).

Based on this record, *Yakama Indian Nation* found that Stevens "unconditionally guaranteed that the Yakamas would have the right to take their ... goods to market." *Id.* at 1253. The United States negotiators'

"statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." *Id.* at 1265 (Finding 66); J.A. 70a.

It could hardly be any other way. The Treaty protects the "right to travel"—not the "right to travel without carrying any goods." Moreover, during treaty negotiations, the Yakamas specifically sought to secure the right to travel while carrying goods with them to market—*i.e.*, the right to transport goods to market—and were specifically promised that the Treaty did just that. The Yakama could not have understood the right they had secured to permit them to travel empty-handed, but not with any tools, provisions, or other goods. Thus, the right to travel encompasses the right to transport goods to market.

2. The right-to-travel provision secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected activity.

The second established proposition is that the Yakama Treaty secures the Yakamas' *preexisting* right to travel—including any preexisting freedom from tax. Thus, if the Yakamas could have, before the Treaty, exercised their right to travel tax-free, the Treaty ensures that this freedom from taxation remains in force.

The text of the Yakama Treaty establishes that the Treaty protects a preexisting right. The Treaty states

that it is "securing the right" to travel, implying that this right already existed. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("The very text of the Second Amendment implicitly recognizes the preexistence of the right and declares only that it 'shall not be infringed.'").

This Court's cases interpreting the Yakama Treaty's right-to-fish provision confirm that the Treaty preserves pre-existing rights. That provision similarly "secure[s] ... the right of taking fish at all usual and accustomed places." *United States v. Winans*, 198 U.S. 371, 378 (1905). In *Winans*, the Court held the right to fish secured by the Treaty "was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment." *Id.* at 381. Thus, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id.* Again, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1977), the Court said: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previously exercised." *Id.* at 678.

In *Tulee v. Washington*, 315 U.S. 681 (1942), this Court applied that principle to find that the right-to-fish provision preempted a nondiscriminatory licensing fee that Washington imposed on all fishermen, including Yakama fishermen. The Court reasoned that "[e]ven though this [fee] may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors

intended to reserve." 315 U.S. at 684-85. In other words, the Yakamas could fish, fee-free, before the Treaty; therefore, by "securing" their right to fish, the Yakamas' right to fish fee-free remained in force.

Although *Tulee* referred to a fishing "fee" rather than a fishing "tax," *Tulee* also establishes that the Treaty preempts taxes on fishing. There is no economic difference between the two. Indeed, *Tulee* emphasized that the fee constituted an obligation to pay for "the support of the state government and its existing public institutions," *id.* at 685—a precise description of a tax. Further, this Court subsequently grounded *Tulee*'s holding in the principle that a State ordinarily lacks the "power to *tax* the exercise of a federal right," because "[t]he power to *tax* the exercise of a privilege is the power to control or suppress its enjoyment." *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 401 n.14 (1968) (emphasis added) (quotation marks omitted).

In *Yakama Indian Nation*, the District Court drew on these authorities to hold that the Treaty's similarly worded right-to-travel provision similarly secured the right to use the highway fee-free. It explained that "the Treaty itself 'secures to' the Yakamas their right to travel the public highways. The plain meaning of this term constitutes a guarantee of a right already possessed." 955 F. Supp. at 1253. It noted that "the Treaty 'further secures' the right to take fish and hunt, indicating an intent that the right to travel was secured in the same manner as the right to take fish." *Id.* It found that "[a]t the time of the Treaty the United States did not charge fees for travel on its public

highways in the Washington Territory." *Id.* at 1263 (Finding 32); J.A. 63a. Further, no United States negotiator "intended to levy a tax against tribes for the use of public roads." *Id.* at 1250.

Therefore, taking the first two established principles together, *Yakama Indian Nation* held that the right-to-travel provision "provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.* at 1262 (Finding 22); J.A. 61a.

3. The right-to-travel provision applies to nondiscriminatory fees and taxes.

The third established proposition is that the Yakama Treaty preempts even *nondiscriminatory* statutes burdening the right to travel.

The Treaty secures the Yakamas' right to travel on public highways "in common with citizens of the United States." The State suggests that in light of the "in common with" language, the right-to-travel provision preempts only laws that discriminate against Yakamas, not those applying to Indians and non-Indians alike. Pet. Br. 28-29 n.9; *see also* U.S. Br. 29 n.8. This argument is incorrect. This Court has rejected this argument with respect to the right-to-fish provision, and *Yakama Indian Nation* rejected this argument with respect to the right-to-travel provision.

As noted earlier, the Treaty's right to fish is also granted "in common with citizens of the Territory." This Court has repeatedly rejected the argument that the phrase "in common with" merely means that Indians have the right not to be discriminated against. *Tulee*, for instance, held that a *nondiscriminatory* fishing licensing fee violated the Treaty. 315 U.S. at 684. Likewise, in *Fishing Vessel*, this Court expressly rejected the proposition that "the words 'in common with' ... be read ... as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians." 443 U.S. at 677.

Yakama Indian Nation extends these principles to the right-to-travel provision. There, the District Court made specific factual findings about the "in common with" language in the right-to-travel provision and concluded that the provision protects against nondiscriminatory fees. It held that "no evidence suggests that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." 965 F. Supp. at 1247. "In the Yakama language, the term 'in common with' would suggest public use or general use without restriction. Therefore, as the Yakamas understood this term, no impediment would be placed on their right to travel." *Id.* at 1265 (Finding 63); J.A. 69a. Further, "[n]othing appears in the factual record which would lead the court to interpret the identical public highway language differently than the manner in which the fishery language has been interpreted." *Id.* at 1266 (Finding 71); J.A. 70a-71a.

Instead, the historical evidence showed, the "in common with" language was added not as a limit on the Yakamas' fish and travel, but to make clear that these rights would be exercised "in common with" non-Indians. Prior to 1855, the Yakamas exercised the exclusive right to fish and travel in an area vastly exceeding the area of the present-day Yakama Reservation. The Treaty ensured that off the Yakama Reservation, Yakamas *and* non-Indians would fish in the same streams and travel along the same roads. Thus, the court found, "[t]he most the Indians would have understood, reading the Treaty as a whole and its interpretive Minutes, of the term 'in common with' and 'public' was that *they would share the use of the roads with whites.*" *Id.* at 1265 (emphasis added) (Finding 63); J.A. 69a. That is, "[t]he term 'in common with' in Article III implies that the Indian and non-Indian use will be joint but does not imply that the Indian use will be in any way restricted." *Id.* (Finding 64); J.A. 69a.

4. The right-to-travel provision preempts fees and taxes, but does not preempt certain regulatory provisions.

The fourth established proposition is that the Treaty's right-to-travel provision distinguishes between taxes, which are preempted, and regulatory provisions necessary to protect public safety or to ensure the free and safe use of the highways, which are not. The State suggests Respondent's position would jeopardize such regulatory provisions. Pet. Br. 44. Both the right-to-fish cases and *Yakama Indian Nation* establish that this concern is unfounded.

As noted above, the Treaty's "in common with" language altered the status quo *ante*, extending non-Indian fishing and traveling to areas previously exclusive to the Yakamas. The Treaty hence opened the door to regulatory laws designed to ensure that non-Indians could freely and safely exercise those rights, such as fishing conservation laws and speed limit laws.

Thus, in *Tulee*, this Court held that "[w]hile the treaty ... forecloses the state from charging the Indians a fee," it "leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature." 315 U.S. at 684. In *Puyallup*, this Court confirmed that the State is authorized to enact "a 'regulation' concerning the time and manner of fishing outside the reservation" that is "necessary for the conservation of fish," "as opposed to a 'tax.'" 391 U.S. at 401 n.14 (parentheses and quotation marks omitted). In *Yakama Indian Nation*, the Court similarly held that the Yakamas "must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right to travel." 955 F. Supp. at 1287 (Finding 84); J.A. 73a.

II. BECAUSE WASHINGTON'S TAX INFRINGES A PREEXISTING RIGHT THAT THE YAKAMA TREATY PROTECTS, IT IS PREEMPTED, REGARDLESS OF WHETHER IT IS A "POSSESSION" OR "TRANSPORTATION" TAX.

These principles require the Court to find preemption in this case. Washington's tax is preempted because it infringes Respondent's preexisting right to travel on the highway tax-free. This analysis is consistent with a natural reading of the Treaty: that it prevents the State from exploiting Respondent's off-reservation travel to impose a tax that could not be imposed for on-reservation activity. Under this analysis, it is irrelevant whether the tax is "on" possession or "on" transportation: preemption turns on whether the sole basis for the State's taxation of Respondent is Respondent's exercise of treaty-protected rights, not whether the tax can be described, at a higher level of abstract generality, as being a tax "on" something else.

A. Because Washington's tax infringes a preexisting tax exemption, it is preempted.

This case boils down to a straightforward syllogism.

- When Respondent transports fuel from the Washington state line to the reservation, it engages in activity protected by the right-to-travel provision.

- The Yakamas were free from taxation on travel at the time of the Treaty, and the Treaty secures that right.

- Therefore, Respondent has the Treaty right to transport fuel to the reservation tax-free.

First, as explained in Part I, *Yakama Indian Nation* held that transporting goods to market—*i.e.*, causing them to travel to market—is a protected Treaty right. Here, Respondent's *sole* off-reservation act within the State consists of transporting goods—fuel—to market over 27 miles of public highways from the Washington/Oregon state line to the reservation.

Indeed, during Treaty negotiations, Governor Stevens promised the Yakamas that they would "be near the great road," which would allow them to take their goods "down the river ... to market." 965 F. Supp. at 1244. Here, Respondent transports goods on the highway connecting the Yakama Reservation to the Columbia River on the Washington/Oregon state line—the precise travel contemplated by Governor Stevens.

Thus, when Respondent transports fuel to the Yakama Reservation, it exercises its rights under the Treaty.

Second, the Yakamas were free from taxation on travel at the time of the Treaty, and the Treaty secures that right.

As an initial matter, Respondent's transportation of fuel would not have in fact been taxed in 1855. The State has proffered no evidence, and Respondent is

aware of none, that before the Treaty, transportation of goods to market for sale would have resulted in any tax liability for Yakamas. A state tax would have been impossible because the State of Washington did not exist, and there is no record of any federal or territorial tax. That was enough for the court in *Yakama Indian Nation* to find preemption: the court held that because "[a]t the time of the Treaty the United States did not charge fees for travel on its public highways in the Washington Territory," such fees were preempted. *Id.* at 1263 (Finding 32); J.A. 63a.

Here, however, there is an additional argument for preemption. There is more than the mere absence of taxation: Respondent had a preexisting *immunity* from taxation with respect to the travel here. That is because all of Respondent's travel takes place in the Ceded Area—that is, the land that the Yakamas ceded in the Yakama Treaty. Pet. App. 64a.

It is a bedrock tenet of federal Indian law that Indians are immune from state tax based on their activity in Indian country. As this Court has explained, this tenet follows from principles of Indian sovereignty that were already well-established at the time of the Yakama Treaty. *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168-69 (1973) (tracing history of Indian tax immunity back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). And this tenet retains vitality today. Indeed, this Court has specifically held that Indians are immune from fuel excise taxes triggered by on-reservation sales. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("*Oklahoma*") (holding such a tax

preempted because a State may not "levy a tax directly on an Indian tribe or its members inside Indian country").

In this case, Respondent's travel from the Washington/Oregon state line to the Reservation occurs *solely* within the Ceded Area. Pet. App. 64a. If Respondent had engaged in that travel before the Treaty, it would have been in Yakama territory—and therefore immune from tax.

The right-to-travel provision leaves that tax immunity in place. As explained in Part I, *Tulee* and *Yakama Indian Nation* establish that the Treaty's right-to-travel provision carries forward preexisting tax immunities. In 1855, the Yakamas were immune from state taxation within their preexisting boundaries. Because the right-to-travel provision secures that pre-existing tax immunity with respect to the activities it protects, even today those activities remain immune from tax when undertaken within those pre-existing boundaries.

Of course, in 1855, the state of Washington did not yet exist, so there were no state taxes to be immune from. But the purpose of the Yakama Treaty was to facilitate non-Indians' settlement of the land, with the ultimate goal of incorporation of Washington as a State. By signing the Treaty, the Yakamas paved the way for this to occur. In return, they secured a promise that if they traveled on the highway, they would retain their rights—including immunity from state taxation.

To be sure, in 1855, the Yakamas could not literally have traveled along the highway Respondent uses in

2018—that highway had not been built. The Yakamas of 1855 traveled on Indian trails, not asphalt roads. But the Treaty, by its terms, protects the right to travel on all public highways, including those that had not been built in 1855. As explained in *Yakama Indian Nation*, "at the treaty negotiations, a primary concern of the Yakamas was that they retain freedom of movement ... whether they did so by Indian trails or by the public roads that the government intended to construct." 955 F. Supp. at 1252. "Through the public highways clause, the Yakamas preserved not only their aboriginal right to continue traveling off-reservation ... but a continuing right to do so on public highways if and when they should be built." *Id.* at 1253. Thus, the Treaty secures the Yakamas' pre-existing freedom from taxation when traveling across former Yakama territory—even if that travel takes place via subsequently-built highways rather than via Indian trails.

Third, therefore, the Treaty preempts the tax. When Respondent transports fuel to the Yakama Reservation, it "exercis[es] the very right their ancestors intended to reserve." *Tulee*, 315 U.S. at 685. In 1854, when the Yakamas exercised their right to transport goods to market, they would have incurred no tax obligations. Indeed, with respect to travel in Yakama territory, they would have been *immune* from such obligations. The Treaty therefore secures Respondent's right to bring goods to market without incurring a tax obligation.

B. The Treaty is naturally understood to treat taxation of off-reservation travel in parallel with taxation of on-reservation activity.

This analysis is consistent with the most natural reading of the right-to-travel provision: as a provision ensuring that the Yakamas may transport goods to and from market off the reservation without losing the tax immunity they possess for on-reservation activity.

It is undisputed that if the Yakamas' reservation boundary reached the Washington/Oregon state line, the State could not impose its tax, because all of Respondent's in-state conduct would take place on the reservation. But there is a gap between the state line and the reservation entrance, which Respondent's trucks must travel across to reach the reservation. The State seeks to exploit Respondent's travel across that gap in order to impose its tax.

Respondent's position prevents the State from doing so. It ensures that Respondent's travel between the state line and the reservation entrance is treated, for tax purposes, as though that travel occurred on the reservation itself.

This position is consistent with a natural reading of the Treaty. The Treaty secures two types of rights relevant here. First, it secures a reservation. Second, it secures the right to travel to and from the reservation via public highways: it secures "the right of way, with free access from the [reservation] to the nearest public highway," as well as the "right ... to travel upon all public highways."

The State's position is that when the Yakamas exercise their on-reservation property rights, they are tax immune, but when they exercise their right to travel to and from the reservation, they may be taxed. There is no textual basis whatsoever in the Treaty for this position. To be sure, under the Treaty, the Yakamas' right to use the reservation is exclusive, while their right to use the highway is not. But by "secur[ing]" the off-reservation right to travel, the Treaty leaves intact certain rights the Yakamas enjoyed when they *did* possess that off-reservation land—including freedom to travel tax-free.

The Treaty's history confirms the two types of rights should be treated in parallel. Governor Stevens promised the Yakamas not only a reservation, but the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Yakama Indian Nation*, 955 F. Supp. at 1244. The natural inference from this promise is that, just as the Yakamas enjoyed the liberty to use on-reservation roads tax-free, they would enjoy the "same libert[y] outside the reservation." *Id.*

At a minimum, the Yakamas would reasonably have understood the Treaty to operate that way. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (courts must give "effect to the terms" of a treaty "as the Indians themselves would have understood them" (quotation marks omitted)). Before the Treaty, the Yakamas *already* traveled extensively. *Yakama Indian Nation*, 955 F. Supp. at 1252. By ceding land they previously occupied, the Yakamas relinquished their right to exclude non-Indians from traveling across that land. But with respect to the

Yakamas' *own* travel, it is perfectly reasonable to understand a treaty "securing the right to travel" as permitting the Yakamas to continue traveling as before—*i.e.*, tax-free.

The State offers no historical argument that the Yakamas would have understood the Treaty to create different tax rules for on-reservation activity and off-reservation travel. Instead, it relies entirely on quotations from this Court's cases distinguishing a State's power to tax on- and off-reservation. Pet. Br. 18-21. But in those cases, the treaties at issue did not protect any relevant off-reservation activity, so the States had the authority to tax off-reservation activity. The Yakamas negotiated a different deal. Unlike other Tribes, the Yakamas secured an off-reservation right—the right to travel along the highways. As *Tulee* shows, off-reservation treaty rights preempt off-reservation taxes. Cases about the State's power over off-reservation activity that involve treaties that confer no off-reservation rights are irrelevant to the scope of the State's power over off-reservation activity that is expressly protected by a treaty.

C. Taxes on activities not protected by the Treaty are not preempted.

It is important to emphasize the limits of Respondent's position. Respondent does not suggest that any activity by a Yakama with any connection to a highway cannot be taxed. The Treaty protects the right to travel. If a Yakama is exercising that right, the Treaty preempts the tax. But if the Yakama engages in any off-reservation activities distinct from

the exercise of the right to travel, those activities may be taxed.

Here, the Treaty preempts the tax because Respondent's sole in-state, off-reservation act consists of transporting fuel on the highway to market, which is treaty-protected activity. The State claims it is taxing Respondent's possession, rather than transportation, of fuel. But even if this were true, *but see infra* Part III, it would not be a defense to preemption. Possession is inherent in transportation. It is impossible to transport something without possessing it. Therefore, if Respondent may transport goods without incurring a tax obligation, Respondent necessarily may undertake the constituent acts making up that transportation—including possession of goods while transporting them—without incurring a tax obligation.

By contrast, the right-to-travel provision would not preempt taxation of acts *distinct* from the exercise of treaty rights, such as off-reservation economic transactions occurring before or after the highway travel. Similarly, the State could tax an act that occurred *during* off-reservation highway travel, so long as that act is distinct from the highway travel itself. Suppose, for instance, a Yakama purchased an item from Amazon while a passenger in a moving car. The State could impose its sales tax; the Yakama could not claim an exemption merely because he was on the highway when he made the purchase. This is because the purchase of the item is not inherently part of treaty-protected activity, and so is distinct from the exercise of the treaty right to travel.

D. Whether the tax is "on" possession or "on" transportation is irrelevant to preemption.

The State's core defense to preemption is that the tax is really a tax on the *possession* of fuel rather than the *transportation* of fuel. The State points out that some "possessors" do not transport goods: In-state refineries must pay the tax when they fill trucks with fuel at the refinery. Thus, in its view, the tax is best viewed as a tax on possession. Pet. Br. 27; *see* U.S. Br. 22.

Even if the tax were *expressly* a tax on possession, *but see infra* Part III, it would be preempted. What matters is whether the basis for the State's taxation of *Respondent* is treaty-protected activity. Here, Respondent's possession of fuel cannot be disaggregated from Respondent's treaty-protected transportation of that fuel, so it cannot be taxed. It is irrelevant whether the State *also* chooses to tax other individuals' possession without transport, such that the statute can be described as a general possession tax.

The State's approach to preemption is fundamentally different. According to the State, the tax is not preempted because it also applies to other entities, such as refineries, who do not transport fuel on highways. The State's argument implies that if it did *not* tax in-state refineries at the point of sale, but instead *only* taxed importation, the tax would be an impermissible tax on transportation. But because the tax applies to both, the State contends the tax is no longer a tax on transportation and is thus authorized—even as applied to Respondent's importation.

The State's approach is inconsistent with the right guaranteed by the Treaty. The Treaty protects the *tribal members'* "right to travel." The burden on that right is identical regardless of whether the statute taxes in-state refineries who do not transport fuel. Hence, whether the State separately taxes such refineries should be irrelevant to the preemption analysis.

The State's argument is also inconsistent with this Court's understanding of the right-to-fish provision. This Court has held that the right-to-fish provision provides a permanent easement to enter private property to fish at "usual and accustomed places," and thus preempts state trespass laws that would prevent the Yakamas from entering that property. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919); *Winans*, 198 U.S. at 380, 384. The state trespass laws were not "on" fishing; they applied to anyone entering the property, regardless of whether they intended to fish. But because it is impossible to fish at a "usual and accustomed place" without entering that place, the Court held that—as applied to Yakamas exercising their treaty-protected rights—the law was preempted, regardless of whether the law applied to others not exercising the right.

The same analysis applies here. The tax is preempted because the sole thing Respondent is doing off the reservation is treaty-protected activity: transporting goods to market via public highways. Whether the tax applies to other entities not engaging in that activity is irrelevant.

Indeed, the canon that "Indian treaties are to be liberally interpreted in favor of the Indians, and ... any ambiguities are to be resolved in their favor," *Mille Lacs*, 526 U.S. at 200 (citations omitted), makes this an open-and-shut case in Respondent's favor. The Treaty protects the "right to travel." Respondent's position is that if it is exercising that right and doing nothing else, it cannot be taxed. *Even if* the Treaty were ambiguous, Respondent's interpretation is *at least* a plausible one. The Treaty does not *unambiguously* support the State's theory that a tax burdening the Yakamas' exercise of their right to travel is permissible as long as it also applies to other entities who do not travel.

III. EVEN IF PREEMPTION TURNED ON WHAT THE TAX WAS "ON," WASHINGTON'S TAX WOULD BE "ON" IMPORTATION.

As explained above, it is irrelevant whether the State's tax is "on" first possession or "on" transportation. But even if this were relevant, Respondent would still prevail because the tax is "on" importation—*i.e.*, transportation—of fuel.

A. The tax is preempted because it is expressly triggered by importation.

Tulee and *Yakama Indian Nation* establish that, at a minimum, a tax *expressly* triggered by the exercise of treaty-protected activity is preempted. The fee in *Tulee* was triggered by fishing; the fee in *Yakama Indian Nation* was triggered by highway use; and both courts found this was sufficient to establish preemption.

Here, the Treaty is triggered by transportation of goods. By the statute's express terms, the *importation* of fuel triggers the tax. To "import" goods means to transport them. Thus, the very *thing* that triggers the tax is the exercise of treaty-protected rights. Confirming the point, the state supreme court held that the statute "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. Because the statute states that it is "on" treaty-protected activity, it is preempted as applied to a Yakama engaging in that activity.

The State contends that its statute is triggered by *off-reservation possession*, not *off-reservation transportation*—and the mere fact that the possession *happens* to be on the highway does not make Washington's statute a tax on highway use. Pet. Br. 27. The United States similarly characterizes the highway as merely the "setting for undertaking an act ... that is subject to a general regulation or financial assessment, wherever the act takes place." U.S. Br. 20. To the United States, Respondent's position is equivalent to a person claiming an exemption from a tax on possession of penknives merely because he happens to be possessing them while driving his car. *Id.*

That contention is incorrect. Respondent's travel is *not* incidental to the imposition of the tax; it is essential. Because the statute explicitly applies to "import[ation]," the State must *prove* that Respondent imported goods to apply its tax. Unlike in the penknife hypothetical, the State would be *incapable* of imposing its tax on Respondent unless it proved that Respondent imported the goods—not just possessed them.

The State's and United States' position boils down to a disagreement with the state supreme court's interpretation of state law. Below, the dissent agreed with the State that "'import,' as used here, is a term of art not requiring transportation of any kind." Pet. App. 18a. Thus, the dissent maintained that the tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to Washington." Pet. App. 28a. The United States quotes this language twice. U.S. Br. 19, 31. But the majority rejected this interpretation, finding that the State statute "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. The incidence of a tax is a question of state law, *see Oklahoma*, 515 U.S. at 461, and this Court is "bound by a [state supreme court's] interpretation of state law," *Johnson v. United States*, 559 U.S. 133, 138 (2010).

The State hypothesizes that the statute could be rewritten as a tax on "first possession," and suggests that such a hypothetical statute would not be triggered by transportation. But that is not the statute the State enacted. The statute the state *has* enacted does not actually tax all instances of "first possession." For instance, it distinguishes between "first possessors" depending on their method of transportation. *Supra*, at 7-8. Moreover, if the "first possessor" transports the fuel out of state, it is exempt from the tax. Wash. Rev. Code § 82.38.030(9)(b)(ii).

But even a hypothetical statute applicable to "first possessors" would be preempted. A tax on "first possession" is not actually a tax on possession. A true tax on possessing something applies to anyone who

possesses that thing—whether he possesses it "first" or not. The classic example is a real estate property tax, levied annually on all possessors of real estate. By contrast, a tax on "first possession" means that some possessors are taxed but not others. Thus, the tax is not directed to possession qua possession.

To the contrary, the "first possessor" will invariably be either the refinery (for fuel refined in-state) or the importer (for fuel refined out of state). Thus, for anyone other than a refinery, a tax on "first possession" of fuel is inherently a tax on importation. So the "first possessor" tax would be preempted, even if it does not use the word "import."

But the Court should not even consider this hypothetical statute. The statute states it is triggered by "importfation]," and the state supreme court construed it as such. That suffices to resolve this case.

B. Preemption turns on the trigger for the tax, not its holistic operation.

The State and the United States argue that determining what a tax is "on" requires a holistic view. They argue that when considering what the tax is "on," the Court should analyze the statute's overall operation, rather than focusing on the precise activity by the taxpayer that triggers application of the tax. They observe that in-state refineries are liable for tax when the fuel enters the stream of commerce. Therefore, they maintain that the tax should be viewed as effectively taxing "each gallon of fuel entering the state stream of commerce, irrespective of whether and

how it is transported into the State." U.S. Br. 19; *see also* Pet. Br. 27-28.

This contention is foreclosed by *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). *Wagnon* concerned a Kansas statute enacted in the wake of *Oklahoma*'s holding that States may not tax on-reservation sales of fuel. The Kansas statute instead imposed the tax "on the distributor of the first receipt of the motor fuel"—which occurred off the reservation. *Id.* at 102 (quotation marks and citation omitted). As the dissent pointed out, the statute contained several tax exclusions such that "[w]hen all the exclusions are netted out, the Kansas tax is imposed not on all the distributor's receipts, but effectively *only* on fuel actually *resold* by the distributor to an in-state nonexempt purchaser." *Id.* at 119 (Ginsburg, J., dissenting). The dissent argued that if one viewed the statute holistically (in light of the exclusions), the statute effectively taxed only the fuel sold to in-state retailers—which meant that under *Oklahoma*, the tax was preempted as applied to on-reservation retailers.

The majority disagreed and upheld the tax. It distinguished *Oklahoma* on the ground that what "triggers tax liability [in Kansas] is the sale or delivery of the fuel to the distributor," off the reservation. *Id.* at 107 (majority opinion). Emphasizing the importance of "geographic sovereignty concerns" and "bright-line standards" in Indian tax administration cases, *id.* at 113 (quotation marks omitted), the Court adopted a straightforward rule: Preemption turns on what activity by the taxpayer triggers the tax, rather than

what, viewed holistically, the statute might be said to effectively tax.

Wagnon is significant to this case because the "Washington tax ... operates in the same way as the Kansas tax upheld by this Court in *Wagnon*." U.S. Br. 21. Indeed, the Washington tax was enacted after a prior tax regime, which placed the incidence of the tax on the retailer, was held to be preempted under *Oklahoma*. *See Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005); U.S. Br. 21-22.[4]

Wagnon's "trigger" rule is the State's basis for applying its tax to fuel headed to every other reservation in Washington. Because the tax is triggered when the importer transports the fuel across the state line, not when the importer reaches the reservation and sells the fuel, the tax's incidence occurs outside the reservation. And, for every other tribe, no treaty provision precludes the State from levying a tax triggered by off-reservation transportation.

But under *Wagnon*'s "trigger" rule, the Yakamas prevail. Unlike every other Washington tribe, the Yakamas negotiated a right-to-travel provision. Thus, the trigger for the tax—off-reservation transportation of goods to the reservation—is a protected right under the Yakama Treaty.

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[4] The Washington Supreme Court has noted that it remains undecided whether the new tax actually did "move[] the legal incidence of the fuel tax away from the tribal retailers." *Auto. United Trades Org. v. State*, 357 P.3d 615, 622 (Wash. 2015). However, Respondent has not argued otherwise in this case.

To avoid this result, the State and the United States ask the Court *not* to decide preemption based on the taxpayer's activity that formally triggers the tax. Instead, they ask the Court to take account of the tax's holistic operation and conceptualize it as a tax on fuel entering the stream of commerce. That is virtually identical to the approach this Court rejected in *Wagnon*.

The Court should again reject this approach. The Court should apply the law neutrally: If the formal "trigger" analysis is applied when it favors the State, it should also be applied when it favors a tribe.

C. The State's and United States' explanation of what the tax is "on" is arbitrary.

The position of the State and the United States has a more fundamental flaw. Their core intuition is that "the Washington Legislature was targeting first possession, rather than the use of the highways." U.S. Br. 11; *see also* Pet. Br. 27. But in addition to conflicting with the state court's interpretation of state law, that description is arbitrarily narrow. Even if it were true that the Legislature intended to tax fuel at the moment it enters the stream of commerce, it is simultaneously true that the Legislature's intent can be framed in three additional ways, each of which show that the Legislature *was* targeting protected activity:

- As previously noted, the State enacted its statute in response to *Squaxin*, which held that the incidence of Washington's tax could not fall on in-reservation transactions. The

statute was specifically constructed to exploit the fact that fuel does not originate on Indian reservations, but has to be transported there. As applied to imported fuel, the point of the statute was to ensure the tax's incidence would be outside the reservation—*i.e.*, while the fuel was transported. Thus, the Legislature's "target" was ensuring that the incidence of the tax would be on off-reservation transportation.

- Moreover, like the statute in *Wagnon*, the statute's purpose was to impose an excise tax on all fuel sold at retail in the State—including fuel sold on Indian reservations. Thus, the Legislature's "target" was to subject fuel headed to Indian reservations to an excise tax.

- Finally, under Washington law, fuel tax revenues do *not* go into the State's general coffers, but go exclusively to finance road maintenance, Wash. Const. amend. 18—exactly like highway tolls. Thus, the Legislature's "target" was to bring in revenue that could be used to maintain roads—the exact purpose of a highway toll.

There is no judicially administrable way of selecting among these "targets." Particularly in tax administration, where predictability is so important, preemption should not turn on the holistic question of what the statute's "target" was. Instead, the question should be: What triggers the tax? In this case, the state supreme court authoritatively held that

transportation triggers the tax, which should be the end of the matter.

D. It is irrelevant that the statute does not explicitly mention highways.

The State and United States additionally argue that even if Washington's tax is triggered by *transportation*, it is not triggered by transportation *on the public highways*. They claim that *any* method of importation—not just via highway—triggers the tax. Thus, the fact that Respondent happens to use the highway is an incidental choice, akin to the incidental choice to purchase an item from Amazon while in a moving car. That argument is wrong.

It does not appear to be possible for importation to trigger tax liability without using the highway. The State asserts that it is possible to import fuel via "pipeline" or "barge." Pet. Br. 25. But the tax does not apply to importation of fuel via a "pipeline or vessel" that is bound for a "terminal" or "refinery." *Supra*, at 7 (explaining statute's operation). In that scenario, the tax is imposed only when the fuel is offloaded from the terminal or refinery. *Id.* Under the statute, the "motor vehicle fuel importers" who pay the tax are those who import via "a railcar, trailer, truck, or other equipment suitable for ground transportation." *Id.* Other than unusual situations involving unlicensed entities (*see supra* note 3), it is unclear whether there are *any* scenarios where importation triggers the tax but the fuel was not imported on the highway. Thus, the

statute would work virtually *identically* if the words "on the highway" were added after "importation."[5]

Even if it were possible for the tax to apply to importation via other means, this would be irrelevant. The Treaty protects the Yakamas' right to travel on the highway. Thus, preemption should turn on whether the tax burdens Respondent's use of the highway. Whether the tax could hypothetically be imposed on a barge does not lessen the tax burden on Respondent.

Indeed, the State's theory leads to absurd results. Under the State's theory, a physical blockade on all methods of transportation to and from the reservation would not violate the Treaty, because a burden on transportation *generally*—including both via highway and via airplanes—is not "on" highway use. Or more realistically, if the fee at issue in *Yakama Indian Nation* was a transportation fee rather than a highway fee—and thus also applied to use of airplanes—the

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[5] The State points out that fuel can be imported on railroads. Pet. Br. 25. But it is likely that "highway" travel, under the Treaty, encompasses railroad travel. Today, "highway" is understood to mean asphalt roads on which automobiles travel. That was not true in 1855, when automobiles did not exist. The Treaty negotiations provide evidence that "highway" travel includes railroad travel. The government's negotiator told the Yakamas: "My brother has stated that you will be permitted to travel the roads outside the reservation. We have some kind of roads which perhaps you have never seen.... That kind of road we call a rail road.... Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country ...." *Yakama Indian Nation*, 955 F. Supp. at 1244. Thus, the off-reservation right to travel on "highways" encompasses railroad travel.

State would say that the fee does not violate the treaty. But that cannot be right. The Treaty protects the "right to travel" on the highway. The burden on the Tribe's right to travel on the highway is not lessened by the existence of an airplane tax.

The State's logic is also inconsistent with *Tulee*. The fee in *Tulee* applied to *any* type of fishing, and not only to fishing at "usual and accustomed places"—*i.e.*, the Treaty-protected right. Thus, under the State's theory, because the fee applied both to Treaty-protected and non-Treaty-protected fishing, the fee would not be preempted. Yet the Court held that when a Yakama exercised his right to fish at "usual and accustomed places," the fee was preempted.

Similar reasoning should apply here. If the State taxes both Treaty-protected and non-Treaty-protected transportation, and a Yakama exercises his right to transport on the highway, then the tax is preempted.

Moreover, the Court should consider the perspective of the Yakamas in 1855. At that point, the only way out of the reservation was by roads. Airplanes and pipelines did not exist. The State suggests that by aggregating a burden on highway travel with a burden on other methods of transportation that did not exist in 1855, the State can show it does not burden travel on the highway, and therefore does not violate the Treaty. It is unlikely that the Yakamas would have understood the "right to travel" this way, to put it mildly.

Finally, the Court should take a practical view. In the real world, Respondent's choice to use the highway

is not an incidental choice, akin to the choice to buy an Amazon product in a moving car. As the court below observed, "it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. There is no other means for fuel to reach the reservation. Contra the State, the court was not enacting a general test under which preemption turned on an empirical analysis of the relative practicability of various methods of transport. Pet. Br. 25-26. It was merely expressing the intuition that a tax on transport, when it is physically impossible to transport by any means other than the highway, is a tax on highway transport.

IV. NO CASE LAW SUPPORTS THE STATE'S POSITION.

The State does not grapple with the authorities most pertinent to this case. Most notably, it does not cite *Tulee*—a case interpreting similar language in the same article of the same treaty as this case—anywhere in its brief. Instead, it relies on case law purportedly establishing that preemption of a tax requires a "clear statement," as well as case law upholding other off-reservation state taxes. No such "clear statement" rule exists, and the case law upholding other off-reservation state taxes is irrelevant here.

A. There is no clear-statement rule.

The State contends that a treaty cannot preempt a state tax unless such preemption is "clearly expressed" and "unambiguously proved." Pet. Br. 16. The State does not dispute that the Treaty "clearly express[es]" and "unambiguously prove[s]" that the Yakamas have off-reservation *rights*: It preserves the right to travel

on "all public highways," including highways off the reservation. But the State maintains that the Treaty cannot preempt a tax unless it "clearly" and "unambiguously" refers to *taxes*—and because the Yakama Treaty "says nothing whatsoever about preempting taxes," *id.* at 24, there can be no preemption. The State's proposed clear-statement rule is wrong, for several reasons.

1. The State's theory conflicts with *Tulee* and *Yakama Indian Nation*. *Tulee* held that the Treaty's right-to-fish provision preempts generally applicable taxes, while *Yakama Indian Nation* reached the same conclusion with regard to the right-to-travel provision. Yet neither provision explicitly refers to taxes. If the State's clear-statement rule existed, both cases would have been decided the opposite way.

Indeed, *Tulee*, *Puyallup*, and *Yakama Indian Nation* establish that under the Treaty's right-to-fish and right-to-travel provisions, taxes *are* preempted while certain regulatory provisions are not. *Supra* Part I.B.4. The State's proposed rule—that taxes, but not other laws, require a "clear statement" for preemption—is the precise opposite of that rule.

2. The State's proposed rule has no principled basis. The State's position would assume that a Treaty provision *securing* a preexisting right nonetheless *relinquishes* any associated tax immunity unless it expressly uses the word "tax." The State's proposed rule is not a textualist rule: The whole point of clear-statement rules is to deviate from standard textualist interpretative principles. Nor can it be justified based on the intent of the contracting parties: The State

offers no basis for believing that either the Tribes, or the United States, could possibly have anticipated this rule. A rule of construction that hews *neither* to the text *nor* to the parties' expectations has little to recommend it.

3. The State's proposed rule conflicts with two well-established canons of construction in Indian treaty cases. First, courts must give "effect to the terms" of a treaty "as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196; *Tulee*, 315 U.S. at 684 (Court's "responsibility" is to interpret Yakama Treaty "so far as possible, in accordance with the meaning they were understood to have by the tribal representatives"). Yet, according to the State, unless a treaty refers explicitly to a "tax," it cannot preempt a tax, *even if* all agree that the Indians understood the Treaty's terms to prevent taxation while exercising certain rights.

Second, "Indian treaties are to be liberally interpreted in favor of the Indians, and ... any ambiguities are to be resolved in their favor." *Mille Lacs*, 526 U.S. at 200 (citations omitted); *Tulee*, 315 U.S. at 685 (Yakama Treaty to be interpreted "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"). Under the State's proposed clear-statement rule, however, ambiguities over whether treaties preempt taxes must be resolved in the State's favor, in contradiction of that canon.

4. The State's clear-statement theory is also irreconcilable with a core premise of Indian law jurisprudence: that a State is generally "without power

to tax reservation lands and reservation Indians." *City of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992). If the State's theory were correct, then this Court would have held that States do have taxing authority in Indian country.

Treaty provisions creating Indian reservations typically say nothing about taxes: Article II of the Yakama Treaty, for instance, merely states that the reservation will be "for the exclusive use and benefit of" the Tribe. Yet in *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164 (1973), this Court held that such reservation-creating provisions implicitly bar a state from taxing reservation lands. *McClanahan* held that Arizona's state income tax, as applied to Navajos earning their income on the Navajo reservation, was preempted by the 1868 treaty between the United States and the Navajo Nation. Like the Yakama Treaty, the Navajo Treaty "nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes"; rather, it merely creates, and gives the Navajos authority over, the Navajo reservation. *Id.* at 174. Nevertheless, the Court held that the tax could not be imposed, citing the "general rule" that "in interpreting Indian treaties ... [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Id.* That reasoning cannot be reconciled with the State's express-statement rule, which would have necessitated ruling in Arizona's favor.

Indeed, *McClanahan* suggests that the presumption should go the other way. In *McClanahan*,

the Court emphasized that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive," and that exclusive authority "plainly extended" to preclude "state taxation within the reservation." *Id.* at 168-69 (quoting *Worcester*, 31 U.S. (6 Pet.) at 557). While acknowledging that "modern cases" look "to the applicable treaties and statutes which define the limits of state power," *id.* at 171-72, the Court stated that the "Indian sovereignty doctrine" and its concomitant tax immunity nevertheless provide "a backdrop against which the applicable treaties and federal statutes must be read," *id.* at 172. Thus, *McClanahan* suggests that when a Treaty preserves a right, it also *preserves* the background tax immunity associated with the exercise of that right, unless the treaty expressly states otherwise.

5. The State's authorities do not support the application of a clear-statement canon. The State relies on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); and *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870). Pet. Br. 20-21. But all of those cases apply a different canon: that in interpreting federal *statutes* that confer tax exemptions, the exemptions are to be construed narrowly. Statutes differ from treaties in an important respect: unlike treaties, statutes are not agreements with tribes. A typical statute that Congress unilaterally passes does not need Tribes' consent. But a treaty that could only become enforceable with the Tribe's consent must be interpreted in light of the intent of the signing party,

the Tribe. Thus, when interpreting treaties, the intent of the Tribes matters; when interpreting statutes, it does not. Principles applicable to the latter cannot be blindly imported to the former.

Moreover, in *Chickasaw Nation*, the Court did not hold that the narrow-construction canon for tax exemptions must inevitably prevail over pro-Indian canons. *Chickasaw Nation* did not involve any question of treaty interpretation. Rather, it considered whether a Tribe should be exempt from a generally applicable federal tax. The Tribe invoked the "canon that assumes Congress intends its statutes to benefit the tribes." *Chickasaw Nation*, 534 U.S. at 95. The Court stated that one cannot "say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue." *Id.* It then observed that the "Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength." *Id.* In this case, Respondent merely seeks an individualized assessment of the legal circumstances, as opposed to the unthinking application of a supposed rule that the absence of the word "tax" in a treaty is dispositive.

6. *Cherokee Tobacco* and *Chickasaw Nation* are also distinguishable from this case for a different reason: In those two cases, the Tribes sought exemptions from *federal* taxes. A Tribe claiming an exemption from a *federal* tax—even a treaty-based exemption—is on weaker footing than a Tribe claiming an exemption from a *state* tax. This is because federal statutes can

abrogate treaties, but state statutes cannot. Thus, when a Tribe claims that a treaty overrides a subsequently enacted federal tax statute, the Tribe is really asking the Court not to read the subsequently enacted federal statute literally.[6]

Cherokee Tobacco and *Chickasaw Nation* reflect the unremarkable principle that federal statutes should be read literally. In *Cherokee Tobacco*, the Court held that the federal tax statute did violate the relevant treaty, but the Court was constrained to construe the subsequently enacted federal statute according to its terms: "Undoubtedly one or the other must yield," but because "an act of Congress may supersede a prior treaty, ... the act of Congress must prevail as if the treaty were not an element to be considered." 78 U.S. at 620-21. In *Chickasaw Nation*, which involved no treaty, the Court declined to read an atextual exemption into a generally applicable federal tax statute: "The language of the statute is too strong to bend as the Tribes would wish." 534 U.S. at 89.

In contrast, where, as here, a Tribe claims that a treaty overrides a subsequently enacted state tax, the Tribe does not ask the Court to bend the language of a state statute. Rather, it merely argues that the treaty preempts it.

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[6] To be sure, this Court has stated that federal statutes will not be construed to abrogate Indian Treaties unless there is "clear evidence" that Congress intended to do so. *United States v. Dion*, 476 U.S. 734, 739-40 (1986). But when a federal statute makes clear that a treaty is abrogated, the treaty must yield. By contrast, when a state statute is inconsistent with a treaty, the treaty prevails.

That explains how the Ninth Circuit could, in *Yakama Indian Nation*, declare that state highway taxes are preempted, and then, shortly thereafter, reject Mr. Ramsey's claim that he is also exempt from federal highway taxes. The Ninth Circuit explained: "[*Yakama Indian Nation*'s] analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation." *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002). "The federal government has plenary and exclusive power to deal with tribes," whereas "[a] state's regulatory authority over tribal members is limited by the tribal right of self-government and the preemptive effect of federal law." *Id.* Whether a treaty exempts tribal members from a subsequently enacted federal statute is thus a question distinct from (and irrelevant to) the question whether that treaty exempts tribal members from a subsequently enacted state statute.

B. *Mescalero* and *Oklahoma* do not assist the State.

The State also contends that two cases specifically support its right to levy its tax: *Mescalero* and *Oklahoma*. Pet. Br. 22-24. Neither case assists the State.

Mescalero was not a treaty-interpretation case. Rather, *Mescalero* concerned a federal statute providing that "lands or rights" taken in trust for Tribes "shall be exempt from State and local taxation." 411 U.S. at 155. The Court construed the statute literally, declining to extend the exemption to income derived from use of the land. *See id.* at 156-57. *Mescalero*'s holding is not a surprise. Federal tax

statutes are enacted with precision. If Congress limits a tax exemption to property taxes, courts should take Congress at its word.

This case does not concern the scope of a statutory tax exemption. It concerns an Indian treaty which protects the right to travel. To determine the scope of that treaty, courts must look to the preexisting legal regime, coupled with the Indians' understanding of the treaty. This analysis of the legal backdrop from 1866 was absent from, and irrelevant to, the garden-variety statutory interpretation analysis in Mescalero.

Oklahoma was a treaty-interpretation case—but its rationale favors Respondent. The State relies on the portion of *Oklahoma* in which the Court held that the Treaty of Dancing Rabbit Creek did not preempt Oklahoma from levying its income tax on Indians who resided off the reservation. The pertinent portion of that Treaty specified that no State "shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants." 515 U.S. at 466.

Under the State's proposed clear-statement canon, the Court should have resolved *Oklahoma* on the ground that the Treaty did not specifically refer to "tax." But the Court did not even mention that canon. Instead, it ruled for the State on the ground that the Tribe's claim "founders on a clear geographic limit in the Treaty." *Id.* at 466. "By its terms," the Court reasoned, "the Treaty applies only to persons and property 'within the [Nation's] limits.'" *Id.* Thus, the Treaty "provide[s] for the Tribe's sovereignty within Indian country," but does not interfere with

Oklahoma's "sovereign right to tax income" of those who "choose to live" outside Indian country. *Id.*

Unlike the Chickasaws, the Yakamas negotiated a treaty right that expressly applies outside the reservation. The Court's reasoning therefore does not apply. More generally, *Oklahoma* demonstrates that the sharp distinction this Court ordinarily draws between taxation of on-reservation and off-reservation activity stems from the underlying treaties at issue, which themselves draw that distinction. That analysis cannot be imported to a context where the treaty applies, by its terms, outside the reservation.

V. THE STATE'S PRACTICAL CONCERNS ARE UNWARRANTED.

Contrary to the State's concerns, Respondent's position will not jeopardize Washington's fuel-tax regime or any other tax.

A. Respondent's position will not "decimat[e]" the State's fuel-tax regime.

The State expresses concern that ruling for Respondent would "decimat[e]" the State's fuel-tax regime. Pet. Br. 40. That is incorrect.

As a threshold matter, the sole practical issue here is whether the State can collect tax for a Yakama distributor's transportation of fuel from out of state to the Yakama Reservation. No other Washington Tribe has a treaty with a right-to-travel provision. And with respect to the Yakamas' transportation of fuel for sale

to off-reservation retailers, the State is free to tax the sale, just as it did prior to the enactment of its statute.

With respect to fuel that Respondent transports to the Yakama Reservation, the State has a legitimate policy concern that non-Indians will come on the reservation, buy fuel to avoid taxes, and then drive their cars on off-reservation state roads. But *Oklahoma* offered the solution: "[D]eclar[e] the tax to fall on the consumer and direct[] the Tribe to collect and remit the levy." 515 U.S. at 460. This is how cigarette taxes work on Indian reservations: To prevent Tribes from "market[ing] an exemption from state taxation," Tribes must collect cigarette sales tax from non-Indian purchasers. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980). The State could have similarly imposed its fuel tax on consumers.

Realistically, the State rejected *Oklahoma*'s solution because it is politically unpopular: consumers do not like paying taxes. The State prefers to levy the tax earlier in the supply chain, so consumers can blame the gas station rather than the State for high prices. This decision has consequences: When the tax is triggered by Yakamas engaged in treaty-protected activity, it is preempted.

B. Respondent's position will not affect the collection of cigarette and other taxes.

The State and its amici also claim that Respondent's position would radically affect the State's ability to collect other taxes, most notably cigarette taxes. Their

concern is that if Respondent prevails, the Yakamas will claim an exemption from taxes associated with any goods that merely *were* transported on the highway. That is wrong. Under established precedent, the State is free to tax the off-reservation purchase or sale of goods, regardless of whether they were transported on the highway.

King Mountain Tobacco Co. v. McKenna, 768 F.3d 989 (9th Cir. 2014), illustrates this point. There, the tobacco company, King Mountain, sold cigarettes not only on the reservation, but "throughout Washington and in about sixteen other states." *Id.* at 991. The state tax at issue required tobacco companies to "place money into escrow to reimburse the State for health care costs related to the use of tobacco products." *Id.* at 990. "The amount placed in escrow is based on the number of cigarette sales made that are subject to state cigarette taxes"—*i.e.*, off-reservation transactions. *Id.* at 990-91. King Mountain argued that the Yakama Treaty preempted the tax, because even though the tax was not *triggered* by transportation, the cigarettes that were sold *in fact were* transported on the highway. *Id.* at 997. The Ninth Circuit disagreed and upheld the tax. *Id.* at 998.

The State claims that under Respondent's position, King Mountain would have prevailed. Pet. Br. 32-34. The State is wrong: *Wagnon* establishes that the Ninth Circuit's decision is correct. Indeed, the tribal member's unsuccessful argument in *King Mountain* was structurally identical to the unsuccessful argument in *Wagnon*. In *Wagnon*, the Tribe's theory was that the fuel at issue *would be* sold on the reservation; in

King Mountain, the Tribe's theory was that the cigarettes at issue *had been* transported on the highway. In *Wagnon*, the Tribe lost because the tax was not *triggered* by the on-reservation sale; in *King Mountain*, the Tribal member lost because the tax was not *triggered* by transportation, but rather, was triggered by cigarette *sales* that were subject to tax.

This analysis resolves all the practical concerns identified by the State and its amici. The State expresses concern that Respondent could evade taxes with respect to anything that merely *was* transported on the highway. Its greatest concern is that Respondent will be able to import cigarettes on the highway and sell them statewide, while avoiding cigarette taxes on the ground that the cigarettes were transported on the highway. Pet. Br. 41-43. This is a red herring. Washington's excise tax is imposed on the "sale, use, consumption, handling, possession or distribution" of cigarettes, Wash. Rev. Code § 82.24.020 (2018), all of which may be taxable events even if the cigarettes were transported on the highway. For wholesalers, "handl[ing] for sale any tobacco products that are within this state but upon which tax has not been imposed" is defined as a taxable event. Wash. Rev. Code § 82.26.020(2) (2018). Any time a Yakama wholesaler sells cigarettes to an off-reservation retailer, it would be liable for excise tax under this provision, regardless of whether the cigarettes were transported on the highway.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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